

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0388
Sales and Use Tax
For Tax Years 1995-2001, & 2004**

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax—Imposition

Authority: IC § 6-8.1-5-1; IC § 6-2.5-2-1; IC § 6-2.5-9-3; IC § 6-8.1-5-4;
45 IAC 15-9-2.

Taxpayer protests the assessment of sales tax.

II. Tax Administration—Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the photography business in Indiana. After an audit, the Indiana Department of Revenue ("Department") determined that Taxpayer owed sales tax for the tax years 1995 through 2001 and the last six months of 2004. The Department found that based upon the Taxpayer's invoices and contracts that Taxpayer had been collecting sales tax, but failed to remit the collected tax to the state. Taxpayer protested the imposition of sales tax and penalty. Taxpayer did not attend the scheduled hearing, but left a message requesting a phone hearing. However, Taxpayer left a disconnected number as the contact number. Therefore, the Hearing Officer wrote and issued a Letter of Findings based on the materials in the file.

I. Sales and Use Tax—Imposition

DISCUSSION

All tax assessments are presumed to be accurate; the Taxpayer bears the burden of proving that an assessment is incorrect. IC § 6-8.1-5-1(b).

IC § 6-2.5-2-1 provides, as follows:

- (a) An excise tax, known as the state gross retail tax (“sales tax”), on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided by law, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant is required to collect the tax as agent for the state.

Additionally, IC § 6-2.5-9-3(2) in relevant part, provides that an individual:

[H]as a duty to remit Indiana gross retail (“sales”) or use taxes (as described in IC 6-2.5-3-2) to the department; hold those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.”

At the time of the audit, Taxpayer had not registered as retail merchant with the State of Indiana. Thus, even though Taxpayer collected the sales tax from its customers, it did not remit the sales tax to the Department. Therefore, the Department assessed sales tax liabilities on the Taxpayer. Taxpayer protests the assessments of the sales tax and penalties for two reasons.

First, Taxpayer asserts that it has already paid all of the taxes the Department said it owed under the Amnesty program, and should not be required to pay any more. The Amnesty Program ran from September 15, 2005 to November 15, 2005. A review of Taxpayer’s payment plan under the Amnesty program shows that Taxpayer agreed to pay amounts assessed for liabilities for the tax periods from January 2002 through June 2004. Therefore, what the Taxpayer agreed to pay under the Amnesty program was the amount of tax that the Department knew the Taxpayer owed at that time. Therefore, when the audit was completed in March of 2006, the Department had new amounts which it believed Taxpayer owed. The audit report did not assess additional liabilities for the periods under amnesty and both accounted for and gave credit for the original amnesty payments.

Second, Taxpayer asserts if the sales tax is assessed against it, then it deserves a refund of income tax because the amounts it collected as sales tax and failed to remit were claimed as income on his individual adjusted gross income tax returns. However, this is not the proper avenue for Taxpayer’s request. If Taxpayer wishes to pursue a request for an adjusted gross income tax refund, then Taxpayer can file the appropriate forms for requests for refunds. 45 IAC 15-9-2 provides that “[t]he claim for refund shall be filed on a form prescribed by the department.”

In conclusion, Taxpayer owes the sales tax as assessed. The Taxpayer has already received credit for the amnesty payments it made and has failed to follow the proper procedures for requesting an adjusted gross income tax refund.

FINDING

Taxpayer's protest is denied.

II. Tax Administration—Negligence Penalty

DISCUSSION

The Department issued proposed assessments and the ten percent negligence penalty for the tax years in question. Taxpayer protests the imposition of penalty. The Department refers to IC § 6-8.1-10-2.1(a)(3), which provides, "if a person . . . incurs, upon examination by the department, a deficiency that is due to negligence . . . the person is subject to a penalty."

The Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive the negligence penalty as provided in 45 IAC 15-11-2(c), as follows:

The department shall waive the negligence penalty imposed under IC § 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

In this case, Taxpayer incurred a deficiency which the Department determined was due to negligence under 45 IAC 15-11-2(b), and was subject to a penalty under IC § 6-8.1-10-2.1(a). Under IC § 6-8.1-5-1(b), "the burden of proving that the proposed assessment is wrong rests with

the person against whom the proposed assessment is made.” Taxpayer has not affirmatively established that its failure to pay the deficiencies was due to reasonable cause and not due to negligence, as required by 45 IAC 15-11-2(c).

FINDING

Taxpayer’s protest to the imposition of the penalty is denied.

AB/WL//DK-June 21, 2007